IN THE SUPREME COURT
STATE OF MISSOURI

IN RE:	)	
	)	
JOEL P. EISENSTEIN,	)	Supreme Court No. SC95331
	)	
Respondent.	)	

RESPONDENT'S BRIEF

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STATEMENT OF JURISDICTION

Respondent agrees with Informant's Statement of Jurisdiction.

ARGUMENT

I. FOR THE FOREGOING REASONS, THE SUPREME COURT SHOULD NOT DISCIPLINE THE RESPONDENT.

The facts and circumstances forming the basis of Informant's allegations against Respondent arose in the context from a contentious divorce proceeding between Greg Koch and Katie Koch that primarily involved the financial situation of the parties. It is undisputed that Greg accessed Katie's personal email account without permission. On one occasion, Greg gave a paystub to Respondent for settlement discussions and on another, gave Respondent a direct examination outline obtained from his intrusion in a stack of other documents. Further, there is no evidence Respondent knew of the actions or directed Greg to take the actions. The actions by Greg have resulted in the present proceedings.

Standard of Review

"Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed." *In re Crews*, 159 S.W.3d 355, 358 (Mo. banc 2005). This Court reviews the evidence de novo, independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law. *In re Belz*, 258 S.W.3d 38, 41 (Mo. banc 2008). The panel's findings of fact, conclusions of law, and the recommendations are advisory and, this Court may reject any or all of the panel's recommendations. *In re Coleman*, 295 S.W.3d 857, 863 (Mo. banc 2009).

A. RESPONDENT DID NOT USE METHODS OF OBTAINING EVIDENCE WHICH VIOLATED THE RIGHTS OF A THIRD PERSON IN VIOLATION OF RULES 4-4.4(a) AND 4-8.4(c).

Missouri Rule 4-4.4 states, in relevant part,(a) In representing a client, a lawyer shall … use methods of obtaining evidence that violate the legal rights of such a person. While Petitioner relies on the first sentence of Comment [1], this comment also adds that "It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

On its face, this Rule is inapplicable to the present situation. It is fundamental to this allegation and others that there is **NO** evidence that the Respondent used methods of obtaining evidence that violated the rights of a third person.

The undisputed evidence is that Katie's ex-spouse, Greg, accessed the information by logging into her email. App. Page 116. Greg testified it was his choice to do so. App. 116. Greg logged into the account a couple of times. App. Page 116. He read the direct examination outline and made handwritten notes on the outline. App. Page 118. He gave it to Respondent "with a stack of other stuff" on November 1. App. Page 118-119 and 120. Greg testified that he did not discuss the outline with Respondent at any point. App. Page 120-121.

Respondent recalls the stack being given to him, but testified that he did not specifically look at the outline until Jones presented it to him on the morning of February

11, 2014. App. Page 68 and 123. He also affirmed that he never discussed the outline or the contents of it with Greg. App. Page 64 and 68.

Further, Judge Essner, the trial court judge who listened and weighed the testimony on the emails found that,

> "counsel for Respondent requested an opportunity to testify and adamantly denied that he reviewed any copies of the emails intercepted by [Greg]. Petitioner introduced no evidence to counter that assertion. For this court, the matter of any possibly involvement of Respondent's counsel in the interception of the emails was concluded for purposes of the dissolution case." App. Page 235.

As part of the de novo review, Judge Essner's findings carry substantial weight. He listened to the evidence on February 2014, including the testimony of Respondent and his client, Greg. Any off the record discussion of the emails took place in his chambers. Following those discussions, Judge Essner asked questions at the hearing. His immediate questions and subsequent findings clarify the disputes between Respondent and Informant particularly as the methods of obtaining the information and whether Respondent reviewed the information.

In her testimony, Jones attempted to draw a distinction between the emails and the direct examination outline, but the direct examination outline was addressed by Judge Essner in his ruling.

Despite these uncontested facts, Informant states at the time of the settlement hearing in July 2013, Respondent failed to obtain the latest pay stub information through

proper discovery. Respondent recalled that the paystub was in a stack of paystubs. There is no evidence that, at the time, Respondent knew the source of the pay stub. Respondent testified that while he does not recall using the pay stub or even who was present, he does not dispute Jones testimony that he used the paystub to attempt a settlement. He does not recall the specifics because the settlement discussions failed. Importantly, Greg's single-handed intrusion to access the pay stub was discovered after the issue with the direct examination outline arose, which further indicates Respondent did not know of the source because its recency would have come up at the time of the settlement negotiations.

As for the outline, no party disputes that Greg should not have accessed the email and given it to Respondent with the stack of documents. In fact, when confronted with them by Jones on the morning of the discovery, Respondent testified that he knew the document was "verboten" after only a brief review. App. Page 126. Nonetheless, Informant asserts "Respondent accepted the list from Greg." (Page 28 of Informant's Brief). If Respondent accepted the outline because his client gave it to him in a stack of other stuff, there is still no evidence Respondent asked him to obtain the evidence. While the rule is silent on acceptance, in fact, an attorney would need to review documents to know that some additional action is required as contemplated by Rule 4-4.4(b). As Respondent did not know he had it, he necessarily did not review it.

In practicality, this allegation is summarized best by Informant that states, "Respondent, through the illegal actions of his client, was in possession of Katie's pay document and her lawyer's list of direct examination questions." (Id.) The modifier is the most important. Greg was the bad actor, not the Respondent.

In contrast, Informant would seek discipline of Respondent on the possession of documents without knowledge of the source when there is no evidence in the record that Respondent accessed the email of Katie. The acts of intrusion and making notes were the acts of Greg, not Respondent. Greg delivered the direct examination to Respondent in a stack of documents on the day that was supposed to be a second trial day, but was continued. When this stack of documents was later provided to Stephanie Jones as supplemental discovery answers, the presence of the direct examination outline in the stack was discovered and the hearing conducted by the trial court.

Finally, a simple hypothetical offers perspective. IF Respondent knew he had the outline and knew he had obtained the outline through some sort of improper method, the act of including it in a stack of documents that were supplementing discovery would be counter-productive to such efforts. The more likely scenario would be that the direct examination outline was included in the stack of documents because he was unaware of it in the first place.

Missouri Rule 4.8-4(c) states, "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." There is no evidence Respondent was give the outline or the pay stub through his own dishonesty, fraud, deceit or misrepresentation. As a result, Respondent did not use methods of obtaining evidence in violation of the Rules.

B. RESPONDENT DID NOT REVIEW ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF RULE 4-8.4(c);

Missouri Rule 4-8.4 (c) states, "It is professional misconduct for a lawyer to: (c)

engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." The comments to subsection (c) address whether a lawyer can supervise an undercover investigation.

When Stephanie Jones discovered that the outline was contained in a stack of documents *handed to her* on the morning of trial, Respondent put his client on the stand to discuss the outline and also testified himself. The use of the pronoun "it" in that testimony causes Informant to make these allegation.

According to Informant, the Respondent or his office staff reviewed the direct examination because it was contained in a stack of documents. This connection is too tenuous for a violation.

Again, Greg gave Respondent a stack of documents on November 1. That trial day was continued until February 11. Respondent testified that he "probably" looked at "it." App pg. 64, Transcript of of Proceedings Page 69-70. Respondent testified that "it" was the stack of documents. Informant has asserted that "it" refers to the direct examination outline specifically suggesting that Respondent knew it was contained in the stack of documents and failed to inform Jones.

In his testimony, Respondent testified that the outline was in a stack of documents that his client gave him. App. Page 68. The stack of documents were copied by his staff and provided to Jones on the morning of the hearing in February. App. Page 69, Transcript of Proceedings Page 91-91. When Respondent was handed the outline by Jones, he realized it was verboten. Id., at Transcript of Proceedings Page 87. Respondent did not intend the document to be used as an exhibit because he did not know that he had

it. App. Page 76, Transcript of Proceedings Page 120. Respondent even admits that if he knew he had the outline and gave it to Jones, he would be giving her the "ammunition to come after me." App. Page 77, Transcript of Proceedings Page 123-124.

When confronted by Jones with the outline, Respondent testified his reaction was:

"She came out and said, Where'd you get this? … This is my direct examination. I said, Let me see. … I read about half a page. And that's when I made the comment to her. Well, I'm going to object to all your leading questions." The latter comment was intended as a joke that he should have not made. App. Page 68, and 126.

He continued reaffirming that he had never read the document before that moment. App. Page 76, Transcript of Proceeding Page 118.

The pay stub arose in different circumstances. Respondent testified that he does not have a specific recollection of the pay stub because he had a number of pay stubs. App. Page 64, Transcript of Proceedings Page 72. He may have used the paystub in a settlement over the financial resolution of a divorce. App. Page 64-5, Transcript of Proceedings Page 72-74. One of the problems with the case was that the proceedings stretched over a period of time and the continuing business generated updated records. Id.

Jones testified that Respondent handed her the pay stub at the settlement meeting on July 23. App. Page 159. The paystub contained information about other pay Katie received and the parties were negotiating over the settlement of proceedings. Id.

Respondent testified that he likely used the paystub in the failed settlement negotiations. He has no specific memory of doing so, nor did he question how he

obtained the document. App. Page 67, Transcript of Proceeding Page 83. The paystub was a record of income and therefore a relevant document.

In summary, Respondent's client, Greg, testified that he had accessed the paystub and the outline, but did not disclose that to the Respondent. It is reasonable to expect that spouses, whether soon to be ex-spouses or not, have some financial information of the other. Respondent testified that he did not recall looking at the date of the paystub. App. Page 64, Transcript of Proceedings Pages 72-3.

Further, inadvertent disclosure through email is a risk of communicating in that fashion. In fact, the Missouri Supreme Court Advisory Committee & Legal Ethics Counsel has cautioned,

> "[t]he risks of interception through the internet are probably relatively small, but real. The biggest risk, and one that most certainly has happened, is interception in the environment in which the e-mail is sent and received."
>
> *See* Email Communications with Clients and E-mail Disclaimers, Source: http://molegalethics.org/e-mail-communications-with-clients-and-e-mail-disclaimers/

Here, while the risk of the interception of emails does not excuse the behavior of Greg, it does not invoke a rule violation for Respondent.

C. RESPONDENT DID NOT UNLAWFULLY CONCEAL A DOCUMENT HAVING POTENTIAL EVIDENTIARY VALUE IN VIOLATION OF RULE 4-3.4(a).

Missouri Rule 4-3.4 states, "A lawyer shall not:(a) unlawfully obstruct another

party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act." Petitioner also references Comment 1, which states, "[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." Comment 2 adds further instruction to sub-section (a) in that, "Rule 4-3.4(a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances."

Petitioner alleges Respondent violated this Rule because the direct examination outline was contained in a stack of documents that his client provided to him on November 1, 2013. Petitioner, as it has throughout this process, attaches Respondent's statement that it was "verboten" for him to possess the outline to the time period from November 1 to February 11, 2014. Respondent testified that he was referring to the morning of February 11 and not the period in between the delivery and the discovery. App. Page 63, Page 67 of the Transcript.

Even if this Rule somehow applied to a direct examination outline as having

evidentiary value, Respondent did not conceal its existence. In fact, the opposite is the case.

Petitioner cites a general statement from this Court's decision in *In re Caranchini*, 956 S.W.2d 910 (Mo.banc 1997) that it is misconduct to withhold material information in a legal proceeding. This sweeping statement is certainly true, though likely subject to numerous exceptions such as work-product and privilege in a case by case basis. Still, *Caranchini*, a case with facts dissimilar to this case, does provide an example of when a Rule 4-3.4(a) violation would occur. "Rule 4-3.4(a) states that "[a] lawyer shall not ... unlawfully obstruct another party's access to evidence." Respondent violated this rule by intentionally withholding the name of a potentially helpful witness in an attempt to surprise the defendant at trial." Id, at 918.

Such facts are not present in this case and there is no rule violation.

D. RESPONDENT DID NOT USE ILLEGALLY OBTAINED EVIDENCE IN VIOLATION OF RULE 8.4(c).

Missouri Rule 4-8.4 (c) states, "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Petitioner alleges Respondent violated this Rule because he "used Katie's pay document at the settlement conference." Additionally, Petitioner alleges Respondent violated the Rule because his paralegal "stapled, stickered and hole punched" the direct examination outline that was given to opposing counsel Jones in a stack of exhibits. There is no evidence that Respondent knew he was in possession of illegally obtained evidence as such he could not have violated this Rule.

Furthermore, Respondent did not use the paystub with knowledge of its source. It was a paystub like the others transmitted through discovery. Furthermore, the direct examination was not used in any way. See App. Pages 67-68. Respondent's conduct did not involve dishonesty, fraud, deceit or misrepresentation.

E. RESPONDENT DID NOT THREATEN OPPOSING COUNSEL IN VIOLATION OF RULE 4-8.4(d).

Missouri Rule 4-8.4 (d) states, "It is professional misconduct for a lawyer to: (d) engage in conduct that is prejudicial to the administration of justice."

Petitioner alleges that Respondent violated this Rule by sending an email to Attorney Jones. The email concludes with a statement that "I'm not someone you really want to make a lifelong enemy of, even though you are off to a pretty good start."

Respondent Joel P. Eisenstein has been a member of the Missouri Bar since 1974. Prior to his enrollment in the bar, he served in the United States Marine Corp from 1968 until 1972. App. Page 70, Transcript of Proceedings Page 95. Mr. Eisenstein suffers from PTSD that causes him to become angry and have outbursts. App. Page 67, Transcript of Proceedings Page 81. He had used Jones' firm for his own personal matters. App. Page 181.

Respondent testified that Jones' motion to strike his pleading upset him. He testified to clarify the circumstances of the outline's discovery. Respondent believed that he addressed the matter with the trial court as to his involvement in his client accessing the emails. While the record as a whole is light on the discussion of this email, it is a reasonable implication that hearing gossip about the situation would be upsetting.

In re Westfall, 808 S.W.2d 829 (Mo. banc 1991) held that an objective standard applies, under which the finding of a violation depends "on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Id.* at 837.

The email, while certainly regrettable, is not conduct prejudicial to the administration of justice. Also, there was no follow-up to the email between the parties that might elevate the situation beyond the isolated email.

Petitioner references *In re Madison*, where the attorney was discipline for repeated letters to judges in his cases when the attorney's defense was "none of this conduct and none of his allegations as to the judges' lack of qualifications or integrity should form the basis for discipline because they are all true." 282 S.W.3d 350, 358 (Mo. Banc 2009). It also references a 1944 case disbarring an attorney who made baseless charges and threatened physical violence. *Leimer v. Hulse*, 178 S.W.2d 355 (Mo. banc 1944). Those circumstances are not applicable here.

II. UNDER A PROGRESSIVE DISCIPLINARY SCHEME AND THE MITIGATING FACTORS PRESENT IN THIS CASE, THE SUPREME COURT SHOULD NOT SUSPEND RESPONDENT'S LICENSE INDEFINITELY, WITH NO LEAVE TO REAPPLY FOR REINSTATEMENT FOR TWELVE (12) MONTHS.

The Respondent does not believe that he violated any ethical Rules. If this Court finds that the preponderance of the evidence demonstrates Respondent "received, concealed and used illegally obtained documents" and "threatened opposing counsel" as

alleged by Informant, then the mitigating factors in this case warrant discipline other than a suspension.

Anticipating Respondent's position, Petitioner begins its argument with the definition of "knowledge" and asserts Respondent acted with knowledge.

According to the ABA Standards, the mental state of knowledge is "when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result." In contrast, the Standards also define negligence. "The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." ABA Standard - Definitions.

Contrary to the assertions of the Informant, there is no evidence that the Respondent had knowledge of the illegal source of the paystub and the possession of the direct examination outline.

In fact, upon the discovery of the outline when it was given to Jones in a stack of documents, Respondent asked for a hearing on the record and put his own client on the witness stand to explain the source of the outline. These are not the actions of someone who "received, concealed and used illegally obtained documents." At best, if the acts of the Respondent correspond to a rule violation, he was negligent in not seeking the source of the pay stub that was given to him by his client. As he did not use the direct

examination outline, he neither had knowledge of it nor was negligent in the document being in a stack of "stuff" from his client

Informant also addresses the resulting injury from the acts of Respondent's client. It first references that Katie was shocked to learn that Respondent had Katie's personal financial information and Jones' direct examination questions. With certainty, the realization that her former spouse is accessing her personal email would be alarming, however, that personal financial information becomes known to that person in a divorce is not alarming and had been the issue of the proceedings. The personal financial situation of the divorcing spouses was essentially the only issue in the divorce. In such circumstances, it is reasonable and expected that personal financial information would be discovered. That Jones was initially shaken seems reasonable. Her initial concern was the hacking of her firm computer system. This fear was alleviated when Respondent's client testified that he accessed his former spouse's email.

Informant also states "potential injury" was caused by Greg's intimate knowledge of Jones' direct examination outline. Informant asserts an important point in this argument. Greg, not the Respondent, accessed the email, made written commentary and never discussed any of it with the Respondent. Regarding the impact on the divorce proceeding, the trial court found none.

Here, if the preponderance of the evidence supports a violation, suspension is not appropriate. As to any suggestion of misrepresentation, ABA Standard 6.1, states, "Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving

conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court: Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." ABA Standard 6.12. There is no evidence that Respondent knew that false statements or documents were being submitted to the court or improperly withheld.

The Standards present other options such as Reprimand, which "is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding." ABA Standard 6.13.

Another option is admonition, which "is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding." ABA Standard 6.14.

Jones' discovery of her direct examination outline prompted Respondent to address the matter on the record and in open court. Using ABA Standard 6.1 that "suspension is generally appropriate when a lawyer knows that material information is

improperly being withheld, and takes no remedial action, and causes injury or potentially injury to the legal proceeding…," there is no evidence that Respondent knew the material information was being improperly withheld. In fact, he took remedial action when the discovery was made by addressing the matter in open court on the record.

There are also mitigating factors in this case. The ABA Standards list numerous factors of mitigation, that in relevant part here, include, "(b) absence of a dishonest or selfish motive; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (h) physical disability; (m) remoteness of prior offenses." ABA Standard 9.32.

Here, there is no dishonest or selfish motive by Respondent. When learning of the outline, he took action to rectify consequences of his client's misconduct. He testified and put his client on the stand under oath. While not making an excuse, Respondent testified that he suffers from PTSD.

Informant asserts Respondent's prior discipline history as an aggravating factor. In his testimony, Respondent was forthwith about these proceedings. More importantly, the last such violation was over ten years ago.

If failing to identify the source of the paystub and having unknown possession of direct examination outline are ethical violations, they are negligent not with knowledge. If they are negligent violations of the Rules, then the appropriate discipline would be an admonition or reprimand, not a suspension.

CONCLUSION

The preponderance of the evidence fails to establish that Respondent engaged in misconduct. First, there is no evidence that Respondent used methods of obtaining evidence that violated the rights of a third person. His client admitted to obtaining the evidence, making the notations and never discussed them with the Respondent. Second, while Respondent possessed the direct examination outline in a stack of exhibits and a pay stub that had not been turned over in discovery, he was not aware that he possessed illegally obtained evidence. Third, Respondent did not unlawfully conceal a document having potential evidentiary value. This allegation fails on its face. The circumstances alone negate this allegation. Fourth, Respondent did not used illegally obtained evidence. Again, the client obtained the evidence. A pay stub was used in failed settlement negotiations and a direct examination outline with client's notes that were never discussed was ultimately returned to Jones. Fifth, Respondent did not threaten opposing counsel in the email. The email was a reaction to a situation he believed was previously addressed.

The public and the integrity of the profession were protected by the parties at the trial court. A hearing on the record demonstrated that source of the paystub and the direct examination outline. If Respondent had not testified nor had not put his client on the stand and the source of the documents ultimately discovered in some other fashion, then the circumstances would require a different evaluation. Here, the profession and the public have not been harmed. In the age of increasing technology where data breaches occur at the highest level of government and finance, attorneys and this Court will

continue to deal with circumstances of this nature. However, these circumstances do not warrant discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2015, the Respondent's Brief was sent via the Missouri Supreme Court e-filing system to Respondent's counsel:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b); and

3. Contains 4,647 words, according to Microsoft Word, the word processing system used to prepare this brief.

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